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JAMES H. McKENNEY,
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No. 550.
Reply Brf. of Lucas for Appellees
Filed Mar. 28, 1898.

In the Supreme Court of the United States.

P. H. KIRWAN *et al.*, *Appellants,*
vs.
SIMON P. MURPHY, *et al.*, *Appellees.*
No. 550.

REPLY TO BRIEF FOR APPELLANTS.

Counsel for appellants criticise the statement made in the original brief for appellees to the effect that the circuit court of appeals remanded this case for "farther proceedings." Of course it was not intended in the former brief to say that the words "farther proceedings" were used in the decision of the circuit court of appeals. The reference to page 33 of the printed record on page 6 of our brief, and the quotation on page 7 of the exact language of the order of the circuit court of appeals, affirming the decision below, shows this. We simply intended to and did state the legal effect of the action of the circuit court of appeals.

The case now stands at issue on disputed questions of fact which have never been tried. This is conclusively shown by a reference to the answer of appellants, defendants below, paragraphs 3 (p. 14 of Record), 6 (p. 15), 9 and 10 (p. 17). It is "farther proceedings" by way of a trial of

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these issues that becomes necessary under the action of the circuit court of appeals.

It is cheerfully conceded by the appellees that the contention on page 7 of the brief for appellants is correct to the effect that the decision of the circuit court of appeals was upon "the entire case as it was in the circuit court" and that "it went into the merits of the controversy so far as they appeared in the record sent up." That is to say, the decision from which this appeal is taken passed upon and settled the questions of law raised by the pleadings. But that does not affect the proposition on which the motion to dismiss is based.

On page 8 of the brief just filed, it is alleged that there is an *implied* right of appeal to this Court in such a case as this, at this stage of the controversy. We do not understand that this Court assumes jurisdiction upon implication. It must be affirmatively and expressly conferred. But the language used on page 8 of counsel's brief is, we confess, not clear to us. If it is meant to contend that there is a right of appeal to this Court direct from a circuit court, under Section 5 of the Act of 1891, on the overruling of a demurrer raising the question of jurisdiction, it is met and decided against such contention in McLish *vs.* Roff, 141 U. S., 661, discussed in appellees' original brief, page 10.

It is difficult to understand just how such a question could arise as is supposed in the next to the last paragraph on page 8 of the brief under discussion. Section 6 of the Act of 1891 expressly limits the jurisdiction of the circuit court of appeals to the power "to review by appeal or by writ of error *final decision* in the district court and the existing circuit courts." An "order overruling a demurrer to a bill," as is correctly stated in the brief, is not final and therefore not subject to appeal under this section.

The case of Smith *vs.* Vulcan Iron Works, 165 U. S., 524, so fully quoted from by counsel, has no bearing on the question of the jurisdiction of this Court in the case at bar. That case arose under the second paragraph of Section 6 of the Act of 1891, on an application for certiorari, being a case, "arising under the patent laws," in which the decision of the circuit court of appeals is final, no appeal lying to this Court. But so far as that case discusses the character of the decision of the circuit court of appeals, in a case going to it under Section 7 of the judiciary act of 1891, it is against the views of counsel. It is said, on the last page of the opinion:

"And the merits of the case, having been once determined by the appellate court in reversing the interlocutory decree, were not open to re-consideration at a later stage of the same case, either in that court or in the court below."

So, in the case at bar, these appellants, defendants below, elected to avail themselves of a special, exceptional privilege given them by Section 7 of the Act of 1891, viz: that of procuring from the circuit court of appeals a decision on the law of the case, in advance of the final decision on issues of fact and law by the circuit court. They must abide the result. They might have awaited the final decree of the circuit court and then have gone to the circuit court of appeals under Section 6 of the act, with the right of farther appeal to this court, but they chose to risk the action of the circuit court of appeals and have secured a decision which is the law of the case, on the issues presented by the pleadings. If we are right in this view, the propositions on the last page of counsel's brief are not well founded. It may, of course, be true that parties could go through the form of taking an appeal to the circuit court of appeals and from there here, from a decree of the circuit court making the injunction permanent, but,

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if the appeal should be based on points decided by the circuit court of appeals in the present decision, it would be held that all such questions have been adjudicated by that decision.

It is assumed on page 11 of the brief that a case like this could be brought to this Court for review by certiorari. This question is not presented, of course, but we challenge the implied proposition. It is only cases falling within some of the five classes mentioned in Section 6 of the act of 1891 that come within the second paragraph of that section conferring upon this Court the power to cause such cases to be certified for review.

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Attorneys for Appellees.